



Special circumstances under s 44 of the Crimes (Sentencing Procedure) Act 1999

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Introduction

Since 1989, NSW has had a unique statutory rule which provides that the balance of the term of a sentence of imprisonment must not exceed one-third of the non-parole period unless the court decides that there are special circumstances for it being more.¹ Put another way, a non-parole period of a sentence of imprisonment must not be less than 75% of the full term of sentence (sometimes referred to as the head sentence) unless the court finds that there are "special circumstances" for it being less. Previous Judicial Commission studies² reported that findings of special circumstances were very common. Indeed, the findings from one of these studies prompted the following comment by the NSW Court of Criminal Appeal in 2004:

"There is evidence that findings of special circumstances have become so common that it appears likely that there can be nothing 'special' about many cases in which the finding is made."³

This study provides an empirical and legal analysis of cases dealt with on indictment in which findings of special circumstances have been made. It first reports the prevalence of findings of special circumstances between 1 January 2005 and 30 June 2012. It also identifies the degree to which sentences departed from the 75% statutory ratio. Finally, the study examines the factors which were found to warrant findings of special circumstances and their effect on the ratio between the non-parole period and the term of sentence.

The statutory rule

Section 44(1) of the *Crimes (Sentencing Procedure) Act 1999* provides that when sentencing an offender to imprisonment for an offence, a court is first required to pronounce a non-parole period for the sentence. Section 44(2) further provides that the balance of the term of the sentence must not exceed one-third of the non-parole period for the sentence unless the court decides that there are special circumstances "for it being more" (hereafter described as "the statutory rule"). Section 44(2B) similarly provides that where a court sets an aggregate sentence of imprisonment, the balance of term must not exceed one-third of the non-parole period, unless the court finds that there are special circumstances. Both s 44(2) and s 44(2B) require the court to record its reasons for finding special circumstances.

The statutory rule in its current form was first introduced in NSW in 1989 with the enactment of the *Sentencing Act 1989*.⁴ A similar provision had been enacted in 1988 by an amendment to the *Probation and Parole Act 1983*. Section 20A of that Act provided the non-parole period for serious offences (as defined) "shall be at least three quarters" of "the length of the sentence". Under s 21(3) a court could specify a shorter period "only if it determines that the circumstances justify that course". Before the amendments, a non-parole period of three-quarters of the full term of sentence was regarded as being long and near the top of the range.⁵ It was accepted by

1 *Sentencing Act 1989*, s 5(2) (rep) (effective 25 September 1989 to 2 April 2000), re-enacted with terminology changes by the *Crimes (Sentencing Procedure) Act 1999*, s 44(2) (effective 3 April 2000).

2 See I MacKinnell, D Spears and R Takachi, "Special circumstances" under the *Sentencing Act 1989 (NSW)*, Research Monograph No 7, Judicial Commission of NSW, 1993; J Keane, P Poletti and H Donnelly, "Common offences and the use of imprisonment in the District and Supreme Courts in 2002", *Sentencing Trends & Issues*, No 30, Judicial Commission of NSW, Sydney, 2004; P Poletti, Z Baghizadeh and P Mizzi, "Common offences in the NSW higher courts: 2010", *Sentencing Trends & Issues*, No 41, Judicial Commission of NSW, Sydney, 2012.

3 *R v Fidow* [2004] NSWCCA 172 per Spigelman CJ at [20], commenting on the findings of the study reported in Keane, Poletti and Donnelly, ibid.

4 s 5.

5 *Griffiths v The Queen* (1989) 167 CLR 372.

the Court of Criminal Appeal⁶ and by the High Court in *Griffiths v The Queen*⁷ that since Parliament was aware of past sentencing practice, the amendment “was plainly intended to have a punitive effect”⁸. The punitive effect of the amendment was however undermined by the discrepancy between the duration of non-parole periods imposed by courts and the time prisoners actually served taking account of remissions.⁹ Gleeson CJ explained the “fictional element” of the previous system in *R v Maclay*¹⁰ with reference to *R v O’Brien*:¹¹

“The sentencing judge was specifying a period which was described by the statute as a period before the expiration of which the prisoner was not to be released on parole but the legislation, and the remissions system, produced the qualification that the so-called ‘non-parole period’ was, in the great majority of cases, substantially longer than the period that was actually served before release on parole.”¹²

The *Sentencing Act 1989* abolished the remissions system then operating in NSW. The new sentencing regime was considered harsh compared to its predecessor and it partly explained the increase in the prison population after 1989.¹³

It should be made clear from the outset that while fixing a non-parole period is important, it “is but one part of the larger task of passing an appropriate sentence upon the particular offender”.¹⁴ To focus only on that part of the sentence without regard to the full term of sentence is myopic because, as

the High Court has held, “it is always necessary to recognise that an offender may be required to serve the whole of the head sentence that is imposed”.¹⁵ Indeed, the Court of Criminal Appeal has observed “a period of parole is in itself a sentence”¹⁶ even where a court orders release at the expiration of the non-parole period for sentences of 3 years or less under s 50 of the *Crimes (Sentencing Procedure) Act*.¹⁷

The harshness of any criminal justice system is ultimately measured by the rates of imprisonment, the lengths of the sentences imposed and the actual duration of incarceration. As the duration of incarceration will be significantly affected by the operation of the parole system,¹⁸ in making any assessment of punitiveness, it is necessary to take account of the rules which apply to both:

- the judicial task of fixing a sentence, including fixing the full term of sentence as well as fixing the non-parole period
- the release of offenders on parole either automatically¹⁹ or as a result of an eligibility assessment by the Parole Authority.²⁰

Other jurisdictions

Notwithstanding the importance of focusing on the whole sentence (or full term of sentence), it is useful to compare the NSW position under s 44(2) to the approaches in other jurisdictions.

6 *R v Griffiths* (unrep, 23/3/89, NSWCCA) at 11–12.

7 (1989) 167 CLR 372.

8 *ibid* per Gaudron and McHugh JJ at 391.

9 Second Reading Speech, Sentencing Bill, Legislative Assembly, *Debates*, 10 May 1989, p 7905; *R v Maclay* (1990) 19 NSWLR 112 at 121. See also D Weatherburn and R Howie, “Disappearing non-parole periods and the sentencer’s dilemma” (1985) 9(2) *Crim LJ* 72.

10 (1990) 19 NSWLR 112 at 121.

11 [1984] 2 NSWLR 449.

12 (1990) 19 NSWLR 112 at 121.

13 E Matka, *NSW Sentencing Act 1989*, NSW Bureau of Crime Statistics and Research, Sydney, 1991; A Johnston and D Spears, *The Sentencing Act 1989 and its effect on the size of the prison population*, Research Monograph No 13, Judicial Commission of NSW, Sydney, 1996, and references cited therein at pp 26–28.

14 *Muldock v The Queen* (2011) 244 CLR 120 at [17].

15 *PNJ v The Queen* (2009) 83 ALJR 384 at [11].

16 *R v Moore* [2012] NSWCCA 3 at [38].

17 *ibid*.

18 For example, where parole has been refused by the Parole Authority, an offender may not apply again for parole for a further nine months and that application must not be considered by the Parole Authority more than 60 days before the offender’s annual review date: *Crimes (Administration of Sentences) Act 1999*, s 137A. Note that s 137A is subject to s 137B and the *Crimes (Administration of Sentences) Regulation 2008*, cl 233. Parole systems differ across the States and Territories. For a comparison of these see Sentencing Advisory Council (Vic), *Review of the Victorian Adult Parole System*, Report, March 2012, App 3, pp 108–119, at <https://sentencingcouncil.vic.gov.au/sites/sentencingcouncil.vic.gov.au/files/review_of_the_victorian_adult_parole_system_report.pdf>, accessed 11 June 2013.

19 *Crimes (Sentencing Procedure) Act*, ss 50, 51; *Crimes (Administration of Sentences) Act 1999*, s 159 (sentence of imprisonment for a term of 3 years or less).

20 *Crimes (Administration of Sentences) Act 1999*, Pt 6.

Victoria

The fixing of a non-parole period in Victoria is a matter for the courts' discretion,²¹ subject to the statutory rule that it must be at least 6 months less than the head sentence.²² The Victorian Court of Appeal in *R v Alparslan*²³ held that the sentencing judge erred in using as a benchmark his "usual practice" of fixing a non-parole period representing two-thirds of the head sentence: "although there is a range into which many cases fall for the fixing of a non-parole period, it is not by reason of any standard practice".²⁴

In an earlier case, *R v Bolton*,²⁵ Callaway JA said:

"... there is no fixed ratio between a head sentence and a non-parole period. In the majority of cases the proportion is between two-thirds and three-quarters, but both shorter and longer periods are found".²⁶

Later in *R v Tran*,²⁷ Redlich JA noted the following comment by the Australian Law Reform Commission and observed that it "accords with the observations"²⁸ of Callaway JA above:

"Case law recognises that the non-parole period is generally set at 60 to 66.6 per cent of the head sentence, with the non-parole period increasing to 75 per cent for the worst category of case."²⁹

Murder and more serious crimes that attract longer sentences have a proportion which is higher than two-thirds and proportions exceeding 75% are not "out of the ordinary".³⁰

A proportion that exceeds 75% in the absence of an explanation may invite appellate scrutiny but "does not inevitably lead to the conclusion that the sentencing judge has erred".³¹ There are

several cases where the court has held that a high proportion set by the sentencing judge was appropriate in the circumstances of the case.³²

Following a request to the Sentencing Advisory Council of Victoria, the following statistics have been provided for the County and Supreme Courts of Victoria for the period 2007–08 to 2011–12:

- the most common ratio between the non-parole period and the full term of the overall sentence (effective sentence) was 50% (15.8% of cases)
- the non-parole was set at less than 50% (20.5% of cases); between 50% and 60% (16.7% of cases); at 60% to 66.67% (27.8% of cases); between 66.67% and 75% (11.2% of cases); and at 75% or higher (8.0% of cases)
- the average or mean ratio was 57.16%.³³

Queensland

Like Victoria, the fixing of a non-parole period in Queensland is a matter for the courts' discretion.³⁴ There is no general rule as to what the numerical proportion should be between the non-parole period and head sentence.³⁵ A court has a discretion to fix the eligibility date for parole subject to certain statutory exceptions.³⁶ If no date has been set the prisoner is eligible for parole when half the sentence is served.³⁷ The exceptions to this include: if the offender is subject to a serious violent offender declaration, or sentenced to more than 10 years imprisonment for a serious violence offence, the court cannot make a parole eligibility order until a minimum of 15 years or 80% of the sentence (whichever is lesser) has been served.³⁸ Special parole eligibility provisions apply to prisoners serving sentences of life imprisonment.³⁹

21 *R v Harkness* [2001] VSCA 87 at [24]; *Sentencing Act 1991* (Vic), s 11(1).

22 *Sentencing Act 1991* (Vic), s 11(3).

23 (2007) 170 A Crim R 205.

24 *ibid* at [24]. See also *Vujasic v R* [2011] VSCA 229 at [10].

25 *R v Bolton & Barker* [1998] 1 VR 692.

26 *ibid* at 699.

27 [2006] VSCA 222.

28 *ibid* at [27].

29 Australian Law Reform Commission (ALRC), *Same crime, same time: sentencing of federal offenders*, ALRC Report 103, Canberra, 2006, Ch 9 at [9.26].

30 *R v Romero* (2011) 32 VR 486 at [26].

31 *Green v R* [2011] VSCA 236 at [17].

32 *Mann v R* [2011] VSCA 189; *Mokbel v R* [2011] VSCA 106; *Vujasic v R* [2011] VSCA 229; *Green v R* [2011] VSCA 236.

33 Unpublished data provided by S Farrow, Chief Executive Officer, Sentencing Advisory Council (Vic), 17 June 2013. The ratios provided are for all cases where a non-parole period was set. These findings are compared with NSW in Appendix B.

34 Subject to comity considerations between courts exercising federal jurisdiction: *R v Mokoena* [2009] 2 Qd R 351 at [12].

35 *Penalties and Sentences Act 1992* (Qld), ss 160B–160D.

36 *ibid* s 160A(5).

37 *Corrective Services Act 2006* (Qld), s 184(2).

38 *ibid* s 182; *Penalties and Sentences Act 1992* (Qld), s 161A, Sch 1.

39 *Corrective Services Act 2006* (Qld), ss 181, 181A.

South Australia

For offences which do not fall within the statutory definition of a “serious offence against the person”,⁴⁰ there is no prescribed numerical proportion between the non-parole period and the head sentence in South Australia. Since November 2007, a mandatory minimum non-parole period of four-fifths of the head sentence applies to offenders sentenced to imprisonment for a serious offence against the person.⁴¹ In fixing a non-parole period for an offence with a prescribed mandatory minimum non-parole period, the court may also:

- fix a non-parole period that is longer than the prescribed period if it is satisfied that the objective or subjective factors affecting the relative seriousness of the offence warrant such an order, or
- fix a shorter non-parole period if it is satisfied that special reasons exist to warrant such an order.⁴²

Western Australia

There are two general statutory rules for fixing non-parole periods which apply in Western Australia:

- If the sentence of imprisonment is 4 years or less the prisoner is eligible for parole after half the sentence is served.⁴³
- If the sentence is more than 4 years the prisoner is to be released 2 years before its expiration.⁴⁴

Commonwealth

Part IB of the *Crimes Act 1914* (Cth) makes exhaustive provision for fixing non-parole periods and making recognizance release orders for Commonwealth offences.⁴⁵ Subject to some specific offence exceptions (for example, people smuggling and terrorism offences), there is no determined norm or percentage (of a head

sentence) for a non-parole period or recognizance release orders for Commonwealth offences.⁴⁶ It is wrong to begin from an assumed percentage such as 60 to 66% and then to identify special circumstances justifying a departure from it.⁴⁷

The above comparison shows that NSW is one of the few Australian jurisdictions which has a peculiar statutory rule constraining a court’s discretion when it sets a non-parole period. The statutory ratio is also relatively high.

The non-parole period and the purpose of parole

Any discussion of the relationship between the non-parole period and the balance of term or parole period inevitably raises the broader question of the purposes each serves.

It is well settled that “the non-parole period is imposed because justice requires that the offender serve that period in custody”.⁴⁸ It is the minimum period of incarceration that the offender must spend in full-time custody having regard to all of the elements of punishment, including rehabilitation, the objective seriousness of the crime and the offender’s subjective circumstances.⁴⁹ Although the risk of re-offending is a relevant factor in setting the non-parole period, the sentence must always be proportionate to the crime. Preventative detention is not permitted.⁵⁰

The parole period of a sentence serves other functions. After the offender has served the minimum period that justice requires, parole provides “for mitigation of the punishment of the prisoner in favour of his rehabilitation through conditional freedom”.⁵¹ The parole system was historically designed to encourage the offender’s good behaviour during the non-parole period.⁵² However, during the parole period the focus is firmly on the rehabilitation of the offender. This includes ensuring that an offender will

40 *Criminal Law (Sentencing) Act 1988* (SA), s 32(10)(d).

41 ibid s 32(5). Note that a mandatory minimum parole period of 20 years also applied if a court was sentencing a person to life imprisonment for murder.

42 ibid s 32A.

43 *Sentencing Act 1995* (WA), s 93(1).

44 ibid. See also s 94 of the *Sentencing Act 1995* (WA) as to how that jurisdiction calculates eligibility dates for parole where the prisoner is serving more than one sentence.

45 *Hilli v The Queen* (2010) 242 CLR 520 at [22].

46 ibid at [13], [37]–[38].

47 ibid at [44].

48 *Muldock v The Queen* (2011) 244 CLR 120 at [57].

49 *Power v The Queen* (1974) 131 CLR 623 at 628–629, applied in *Deakin v The Queen* (1984) 58 ALJR 367; *R v Simpson* (2001) 53 NSWLR 704 at [57]; *Caristo v R* [2011] NSWCCA 7 at [27].

50 *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 477.

51 *Crump v NSW* (2012) 86 ALJR 623 per French CJ at [28], quoting *Deakin v The Queen* (1984) 58 ALJR 367 at 367.

52 *R v Maclay* (1990) 19 NSWLR 112 at 116–117.

not re-offend by addressing underlying issues that bear upon the risk of recidivism.⁵³ Rehabilitation includes the notion that the offender “renounce their wrongdoing and establish or re-establish themselves as an honourable law abiding citizen”.⁵⁴ Rehabilitation is to be achieved while an offender is incarcerated, but also by way of treatment and supervision upon release. Parole supervision itself is an acknowledgement that offenders need a period to reintegrate and “are often unable to prevent further offending when reliant upon their own motivation and resources”.⁵⁵

The concept of special circumstances in s 44(2) encompasses these principles concerning rehabilitation and the parole system. Allsop P recognised in *Kalache v R*⁵⁶ that the concept of special circumstances “bears upon an important element and purpose of the sentencing process, rehabilitation”.⁵⁷ However, the incongruity of tying s 44(2) to rehabilitation was observed by Spigelman CJ in *R v Simpson*:⁵⁸

“The requirements of rehabilitation would be best computed in terms of a period of linear time, not in terms of a fixed percentage of a head sentence. The desirability of a longer than computed period of supervision will be an appropriate approach in many cases.”⁵⁹

How is s 44(2) applied?

The concept of “special circumstances” is firmly entrenched in sentencing law. An offender’s legal representative is expected to make submissions addressing factors which may warrant a finding of special circumstances⁶⁰ and particularly what is an appropriate period of supervision on parole for the offender.

The courts have developed principles which govern how the statutory rule should be applied in a given case, which have been refined over a nearly 25-year period. The following propositions can be drawn from the case law:

- The fact that s 44(1) provides that “the court is first required to set a non-parole period” does not mean that the non-parole period must first be determined⁶¹ or that a non-parole period should be set first, which is thereafter immutable.⁶² It is only the pronunciation of orders that is required to be done in that way.⁶³
- The language of s 44(2) constrains the sentencing discretion by providing that the balance of term must not exceed the non-parole period by one-third unless the court finds special circumstances. There is, however, no corresponding rule that the balance of term must not be less than one-third of the non-parole period.⁶⁴ It is advisable for the court to explain why a ratio in excess of 75% was selected to avoid an inference that an oversight must have occurred.⁶⁵
- If there are circumstances that are capable of constituting special circumstances, the court is not obliged to vary the statutory ratio. Before a variation is made “it is necessary that the circumstances be sufficiently special”.⁶⁶ The decision is first one of fact — to identify the circumstances, and secondly one of judgment — to decide whether the circumstances justify a lowering of the non-parole period below the statutory ratio.⁶⁷ A finding of special circumstances is a discretionary finding of fact.⁶⁸
- The full range of subjective considerations is capable of warranting a finding of special circumstances.⁶⁹ It will be comparatively rare for an issue to be incapable, as a matter of law, of ever constituting a “special circumstance”.⁷⁰

53 *R v Pogson* (2012) 82 NSWLR 60 at [101].

54 *ibid* at [122].

55 M Pearse, “The effectiveness of probation and parole supervision in NSW” (2012) 24(7) *JOB* 53 at 55.

56 [2011] NSWCCA 210.

57 *ibid* at [2]; see also per Buddin J at [45].

58 (2001) 53 NSWLR 704.

59 *ibid* at [58].

60 *Edwards v R* [2009] NSWCCA 199 at [11]; *Jinnette v R* [2012] NSWCCA 217 at [96].

61 *Musgrave v R* (2007) 167 A Crim R 424 at [44].

62 *R v Way* (2004) 60 NSWLR 168 at [111]–[113], citing *R v Moffitt* (1990) 20 NSWLR 114.

63 *Eid v R* [2008] NSWCCA 255 at [31].

64 *Musgrave v R* (2007) 167 A Crim R 424 at [27]; *DPP (NSW) v RHB* (2008) 189 A Crim R 178 at [17], [19]; *Wakefield v R* [2010] NSWCCA 12 at [26].

65 *Wakefield v R*, *ibid* at [26]; *Briggs v R* [2010] NSWCCA 250 at [34].

66 *R v Fidow* [2004] NSWCCA 172 per Spigelman CJ at [22].

67 *R v Simpson* (2001) 53 NSWLR 704 at [73]; *Fitzpatrick v R* [2010] NSWCCA 26 at [36].

68 *R v El-Hayek* (2004) 144 A Crim R 90 at [103]; *Caristo v R* [2011] NSWCCA 7 at [28].

69 *R v Simpson* (2001) 53 NSWLR 704 at [46], [60].

70 *ibid*.

Findings of special circumstances have become so common that it appears likely that there can be nothing “special” about many cases in which the finding is made.⁷¹

- Generally speaking, the reform of the offender will often be the purpose in finding special circumstances, but this is not the sole purpose.⁷² An offender’s good prospects of rehabilitation may warrant a finding of special circumstances.⁷³ However, if an offender has poor prospects of rehabilitation and shows a lack of remorse, protection of the society may assume prominence in the sentencing exercise and militate against a finding of special circumstances.⁷⁴ The risk of institutionalisation, even in the face of entrenched and serious recidivism may justify a finding of special circumstances.⁷⁵ However, the existence of the factor does not require a finding.⁷⁶ If institutionalisation has already occurred the focus may be on ensuring that there is a sufficient period of conditional and supervised liberty to ensure protection of the community and to minimise the chance of recidivism.⁷⁷ An offender’s youth,⁷⁸ advanced age,⁷⁹ the need to treat a drug addiction,⁸⁰ ill health,⁸¹ mental illness,⁸² considerations of parity,⁸³ and the fact that the offender will suffer harsher custodial conditions⁸⁴ have all been acknowledged as circumstances which may justify a finding of special circumstances.
 - A finding of special circumstances permits an adjustment downwards of the non-parole period, but it does not authorise an increase
- in the term of the sentence.⁸⁵ Nor should the formulation in s 44(2) be interpreted as a 75% “statutory norm” or as Gleeson CJ described it (the statutory predecessor to s 44(2)), “a suggestion that the statutory ratio of 3:1 was a norm in the sense that variation in either direction, up or down, was, absent special circumstances, contrary to the statute”.⁸⁶ The extent of the adjustment is not determined by any “norm” and the court is to be guided by general sentencing principles.⁸⁷
- Where special circumstances are found on the basis of the desirability of an offender undergoing suitable rehabilitative treatment, it is an error for a court to refrain from adjusting the sentence based on a view that the offender would benefit from treatment while in full-time custody.⁸⁸ This is because full-time custody is punitive and treatment in prison is a matter in the executive’s discretion. An offender may not qualify for a program in custody or it may not be available.⁸⁹
 - The degree or “extent of any adjustment to the statutory requirement is essentially a matter within the sentencing judge’s discretion”⁹⁰ including consideration of those circumstances which concern the nature and purpose of parole discussed above.⁹¹
 - A court can have regard to the practical limit of 3 years on parole supervision which an offender may receive under cl 228 of the *Crimes (Administration of Sentences) Regulation 2008*.⁹²

71 *R v Fidow* [2004] NSWCCA 172 at [20].

72 *R v El-Hayek* (2004) 144 A Crim R 90 at [105].

73 *Arnold v R* [2011] NSWCCA 150 at [37]; *RLS v R* [2012] NSWCCA 236 at [120].

74 *R v Windle* [2012] NSWCCA 222 at [55].

75 *Jackson v R* [2010] NSWCCA 162 at [24].

76 *Dyer v R* [2011] NSWCCA 185 at [50]; *Jinnette v R* [2012] NSWCCA 217 at [98].

77 *Jinnette v R*, ibid at [103].

78 *AM v R* [2012] NSWCCA 203 at [86]; *Kennedy v R* (2008) 181 A Crim R 185 at [53].

79 *R v Mammone* [2006] NSWCCA 138 at [54].

80 *Sevastopoulos v R* [2011] NSWCCA 201 at [84]–[85].

81 *R v Mammone* [2006] NSWCCA 138 at [54].

82 *Muldock v The Queen* (2011) 244 CLR 120 at [58]; *Devaney v R* [2012] NSWCCA 285 at [92].

83 *Tatana v R* [2006] NSWCCA 398 at [33].

84 *Mattar v R* [2012] NSWCCA 98 at [23]–[25], but see *RWB v R* (2010) 202 A Crim R 209 at [192]–[195].

85 *R v Tobar* (2004) 150 A Crim R 104 at [36]–[37]; *R v Huynh* [2005] NSWCCA 220 at [35]–[39]; *Markham v R* [2007] NSWCCA 295 at [29].

86 *R v GDR* (1994) 35 NSWLR 376 at 380.

87 *Caristo v R* [2011] NSWCCA 7 at [28].

88 *Muldock v The Queen* (2011) 244 CLR 120 at [57]–[58].

89 ibid at [57].

90 *Clarke v R* [2009] NSWCCA 49 at [13]; *R v Cramp* [2004] NSWCCA 264 at [31].

91 *R v GDR* (1994) 35 NSWLR 376 at 381.

92 *AM v R* [2012] NSWCCA 203 at [90]; *Collier v R* [2012] NSWCCA 213 at [37]; *Jinnette v R* [2012] NSWCCA 217 at [107].

However, in the case of a “serious offender”,⁹³ the period of supervision may be extended by, or a further period of supervision imposed of, up to 3 years at a time.⁹⁴

- A purported failure to adjust a sentence for special circumstances raises so many matters of a discretionary character that the Court of Criminal Appeal has been very slow to intervene. As a practical matter, the court will only intervene if the non-parole period is manifestly inadequate or manifestly excessive.⁹⁵ Ultimately the non-parole period that is set is what the court concludes, in all of the circumstances, ought to be the minimum period of incarceration.⁹⁶

Where does s 44(2) fit in the sentencing exercise?

The High Court has made it clear that:

“... express legislative provisions apart ... judges at first instance are to be allowed as much flexibility in sentencing as is consonant with consistency of approach and as accords with the statutory regime that applies”.⁹⁷

There is no principle which:

“... dictates the particular path that a sentencer, passing sentence in a case where the penalty is not fixed by statute, must follow in reasoning to the conclusion that the sentence to be imposed should be fixed as it is. The judgment is a discretionary judgment ... ”.⁹⁸

In the case of s 44(2), Parliament has not prescribed at which stage of the sentencing exercise the court must consider the issue of special circumstances. The ratio in s 44(2) is not to be treated as a

statutory norm. This was made clear in *R v GDR*⁹⁹ and *Caristo v R*.¹⁰⁰ One author has asserted that “a significant number of NSW judges” have applied s 44(2) as “a *prima facie* position”,¹⁰¹ that is, they have assumed that the balance of the term of the sentence must not exceed one-third of the non-parole period of the sentence and then enquired whether special circumstances exist which justify a longer parole period.¹⁰² He argues that the better approach is for the court to first apply “general sentencing principles” and determine a non-parole period and balance of term without reference to s 44(2).¹⁰³ If the balance of term happens to exceed the non-parole period by one-third, the court then asks whether special circumstances exist.¹⁰⁴ “If the answer is ‘no’, a non-parole period of 75% of the term of the sentence will have to be imposed”.¹⁰⁵ If it is “yes” the initial determination, based on general sentencing principles, will stand. It is not clear how this second approach avoids double counting factors that have been taken into account in determining the head sentence.¹⁰⁶ It is also not clear how the second approach applies in the case of sentencing for multiple counts where, although the same factors are relied on to justify a finding of special circumstances, “the exercise of the discretion [to find special circumstances] may ... be productive of different results at different phases of the sentencing process”.¹⁰⁷ Arguably both approaches are erroneous because each introduces a bright line rule and each fails to have regard to the fact that the application of s 44(2) is inextricably linked to findings about an offender’s rehabilitation. There is nothing in s 44 or the case law which mandates a method or, to adopt the High Court’s term in *Markarian v The Queen*,¹⁰⁸ the “path” the sentencer must take.¹⁰⁹ Section 44(2) is a conditional rule in respect of the balance of term of the sentence which is pronounced.

93 Crimes (Administration of Sentences) Act 1999, s 3(1).

94 Crimes (Administration of Sentences) Regulation 2008, cl 228(2).

95 *R v Cramp* [2004] NSWCCA 264 at [31]; *R v Fidow* [2004] NSWCCA 172 at [19]; *Jiang v R* [2010] NSWCCA 277 at [83].

96 *Muldock v Queen* (2011) 244 CLR 120 at [57]; *R v Simpson* (2001) 53 NSWLR 704 at [59].

97 *Markarian v The Queen* (2005) 228 CLR 357 at [27].

98 *ibid*.

99 (1994) 35 NSWLR 376.

100 [2011] NSWCCA 7.

101 SJ Odgers, *Sentence*, Longueville Books, Woollahra, 2012, p 388.

102 *ibid* at 389.

103 *ibid*.

104 *ibid*.

105 *ibid*.

106 The prohibition on double counting was reiterated by Spigelman CJ in *R v Fidow* [2004] NSWCCA 172 at [18].

107 *Spark v R* [2012] NSWCCA 140 per Fullerton J at [35].

108 (2005) 228 CLR 357.

109 *ibid* at [27].

Data source and methodology

The following analysis examines sentencing cases finalised in the NSW District and Supreme Courts (the higher courts) for the period 1 January 2005 to 30 June 2012 (the reference period).¹¹⁰

First instance sentencing data are provided by the Bureau of Crime Statistics and Research (BOCSAR) and then audited and processed to generate the statistics which appear on the Judicial Information Research System (JIRS). Using data from the NSW Court of Criminal Appeal database maintained by the Judicial Commission, the statistics on JIRS are adjusted or altered to take into account the outcomes of successful conviction or sentence appeals to the Court of Criminal Appeal and the High Court of Australia.¹¹¹

JIRS statistics are appearance (or person) based, so that where an offender has been sentenced in more than one finalised court appearance during the reference period, the sentence imposed in each finalised court appearance is included.¹¹² The sentence for the “principal offence” is shown in each case. Where an offender has been sentenced for multiple offences in a single finalised court appearance, the principal offence is the one that attracted the most severe penalty.¹¹³ The overall (or aggregate) sentence imposed is recorded in addition to the sentence imposed for the principal offence.¹¹⁴

Cases where either the full term or the non-parole period for the overall sentence exceeds the full term or non-parole period for the principal offence are referred to as “consecutive cases”. “Non-consecutive cases” are those where sentences are imposed for:

- one offence only
- multiple offences served wholly concurrently
- secondary offences which are subsumed within the sentence for the principal offence.

In such cases, the overall sentence will be the same as the sentence for the principal offence.

Exclusions

As the analysis of special circumstances is concerned with sentences of full-time imprisonment only, sentences for home detention and the now repealed sentencing option, periodic detention,¹¹⁵ are excluded from the study.¹¹⁶

Sentences of imprisonment imposed for Commonwealth offences are excluded from the study on the basis that Pt IB, Div 4 of the *Crimes Act 1914* (Cth) makes exhaustive provision for the fixing of non-parole periods for these offenders.¹¹⁷

Fixed terms of imprisonment imposed for State offences where the sentencing judge declined to set a non-parole period (for the overall sentence) are also excluded as s 44(2) is not engaged.¹¹⁸

110 The latest data available.

111 Outcomes in appeal cases contained in the Court of Criminal Appeal database up to and including 15 February 2013 have been taken into account. Where an appeal to the Court of Criminal Appeal or the High Court resulted in an acquittal, a new trial or remittal to the lower court, the record was removed from the data. If the appeal resulted in a new sentence, that sentence replaced the first instance penalty on the Judicial Information Research System (JIRS). Sentences imposed after a retrial or remittal are included if they fall within the reference period.

112 Sentences imposed following breaches by offenders of suspended sentences, community service orders (CSOs) and good behaviour bonds are excluded on the basis that they arise under breach provisions which provide for a call-up procedure which may result in offenders being resentenced for the original offences. Hence, these are not regarded as offences in the strict sense.

113 If an offender is convicted of two or more offences and received identical penalties, the offence with the highest statutory maximum penalty is selected as the principal offence. If two or more offences have the same statutory maximum penalty, the offence with a Form 1 attached is selected as the principal offence. In the absence of a Form 1, a standard non-parole (SNPP) offence, substantive offence, or a completed offence rather than a “with intent” offence, is selected as the principal offence. Where none of these differentiating features is present, the offence with the highest Median Sentencing Ranking (MSR) is selected as the principal offence. The MSR is a measure of offence seriousness in NSW, jointly developed in 2010 by BOCSAR and the Judicial Commission of NSW. See I MacKinnell, P Poletti and M Holmes, “Measuring offence seriousness”, *Crime and Justice Bulletin*, No 142, BOCSAR, 2010.

114 Where aggregate sentences are imposed under s 53A of the *Crimes (Sentencing Procedure) Act*, the sentence for the principal offence is derived from the indicative sentence for that offence as recorded in the sentencing judge’s remarks on sentence: s 53A(2)(b). An indicative non-parole period was recorded in only 28 of 113 cases in the study where an aggregate sentence was imposed. The length of the overall sentence does not include sentences which are consecutive or partly consecutive on existing sentences (that is, sentences imposed at an earlier court appearance) or sentences imposed following a call-up for a breach: see above n 112.

115 Periodic detention ceased to be an available sentencing option from 1 October 2010: *Crimes (Sentencing Legislation) Amendment (Intensive Correction Orders) Act 2010*, Sch 1[6].

116 Home detention and periodic detention accounted for a small percentage of sentences of imprisonment requiring a non-parole period to be set (0.4% and 5.3% respectively).

117 *Hill v The Queen* (2010) 242 CLR 520 at [22]. There were 1,002 cases excluded from the study where the principal offence was a Commonwealth offence (including 21 fixed terms of imprisonment).

118 Fixed terms of imprisonment included sentences of life imprisonment (15 cases); limiting terms (47 cases); *Mental Health (Forensic Provisions) Act 1990*, s 23(6)(a); sentences of 6 months or less (131 cases); *Crimes (Sentencing Procedure) Act*, s 46; and other reasons for declining to set a non-parole period (170 cases); *Crimes (Sentencing Procedure) Act*, s 45(1).

Mathematical approach to selection of special circumstances cases

The sentencing judge's remarks on sentence were not available for the majority of cases in the study. Accordingly, whether the sentencing judge expressly made a finding of special circumstances and the reasons for making such a finding could not be ascertained directly. As a result, it was necessary to adopt a mathematical approach whereby it was surmised that a finding of special circumstances had been made in all cases where the non-parole period was less than three-quarters (or 75%) of the full term of sentence (the statutory ratio). Using this mathematical approach, the study identifies cases where findings of special circumstances were made in respect of the sentence imposed:

- for the principal offence
- at the overall (aggregate) sentence level.

Special circumstances calculated at the overall level

It was necessary to make a decision about whether the frequency of findings of special circumstances and the degree of departure from the statutory ratio in s 44(2) should be measured at the individual level, that is, by reference to the principal offence, or alternatively, at the overall level, that is, by reference to the overall sentence. For non-consecutive cases, it does not matter because the ratio at the principal offence level and the overall level is the same. However, where an offender is sentenced to consecutive sentences the ratios will be different in most cases. After careful consideration, the study adopts the overall level for the purpose of analysis. The reasons for adopting the overall level are considered briefly below and are further set out in Appendix A. In short, a measure based on the overall sentence more closely reflects sentencing practice and ultimately what occurred in the sentencing exercise.

Consequently, cases where a finding of special circumstances was made for the principal offence but not reflected in the overall sentence are excluded from the analysis.¹¹⁹ Conversely, the study includes cases where special circumstances were found for the overall sentence only.¹²⁰

Reasons for using the overall sentence

Sentencing a person convicted of multiple offences is a notoriously complex task. Construed literally, s 44(2) "applies to individual sentences; [and] does not apply, in terms, to an aggregation of several sentences".¹²¹ However, in practice the courts have not regarded themselves as limited by the literal reading of the provision and where a court made a finding of special circumstances for an individual offence it was "assumed that that ratio is to be reflected in the overall sentence ratio, unless the judge expressly signifies otherwise".¹²² Where the judge expressed an intention that the finding not be translated to the overall sentence, there was no basis for appellate intervention on account of judicial omission.¹²³ Further, there was no entitlement that the ratio calculated at the individual level be the same, or similar, at the overall level.¹²⁴ Many of the appeal cases are collected in *Kalache v R*.¹²⁵

Further, the courts apply the totality principle in consecutive cases by reducing the non-parole period for the principal offence where some form of accumulation is considered necessary.¹²⁶ Hence, to use the sentence for the principal offence to determine whether special circumstances were found and to ascertain the degree of departure from the statutory ratio would distort the analysis.

It should also be noted that the concept of aggregate special circumstances has now been introduced in s 44(2A), a provision which a court may apply where it imposes an aggregate term of imprisonment under s 53A of the *Crimes (Sentencing Procedure) Act*.¹²⁷

¹¹⁹ This occurred in 263 cases.

¹²⁰ This occurred in 181 cases (including 78 aggregate sentencing cases under the *Crimes (Sentencing Procedure) Act*, s 53A, where there was no indicative non-parole period for the principal offence).

¹²¹ *R v BT* [2012] NSWCCA 276 per Basten JA at [28].

¹²² *R v DBN* [2005] NSWCCA 435 at [33]; *R v LWP* [2003] NSWCCA 215 at [10].

¹²³ *R v BT* [2012] NSWCCA 276 per Basten JA at [28]; see also the discussion in *Caristo v R* [2011] NSWCCA 7 per RA Hulme J at [36].

¹²⁴ *Spark v R* [2012] NSWCCA 140 at [35].

¹²⁵ [2011] NSWCCA 210 at [37].

¹²⁶ *Hejazi v R* (2009) 217 A Crim R 151 at [36]; *Spark v R* [2012] NSWCCA 140 at [35].

¹²⁷ See n 114 above.

The influence of rounding sentences

It should be noted that in some cases the calculation of ratios between the non-parole period and the full term of sentence may be affected by rounding. In most cases where sentencing data were rounded up from days into whole months, the calculated ratio will be slightly higher than the true ratio had the number of days not been rounded up. This may have led to the rejection of some cases where special circumstances would otherwise have been found to exist using the mathematical approach above.¹²⁸ On the other hand, a sentencing judge who has determined that an appropriate sentence involves days may have rounded down the sentence into complete months.¹²⁹ This may have led to the acceptance of some cases where special circumstances would otherwise not have been found to exist. This may also have occurred in some cases where pre-sentence custody has been taken into account in sentences that were not backdated.¹³⁰

Borderline cases

It should be noted that in some cases the ratio between the non-parole period and the full term of sentence was close to, but did not exceed 75%. In some of these cases, the sentencing judge may not have made a finding of special circumstances, thereby, slightly overstating the frequency of special circumstances cases.¹³¹

Reasons given for special circumstances

While the stated reasons for a finding of special circumstances could not be ascertained for the majority of cases in the study, an examination of a random sample of the available remarks on sentence and/or Court of Criminal Appeal judgments provide an insight into the common reasons for departing from the statutory ratio.¹³² While the reasons given in these cases are examined below, the analysis in the study largely focuses on a statistical analysis of available data to ascertain the relationship between certain factors and findings of special circumstances.

Measures used in analysis

The study employs two measures in its analysis:

- the frequency of findings of special circumstances
- the degree of departure from the statutory ratio for “all cases” and for “special circumstances cases”.

The latter measure uses the average value of all the ratios (mean ratio).¹³³ The principal measure in the statistical analysis is the mean ratio for “all cases”, where lower mean ratios indicate a greater degree of departure from the statutory ratio. As each measure uses a base of 100, only one scale is provided in graphs.

128 An analysis of a sample of cases in the study — those cases finalised at first instance in the 2011 calendar year (1,827 cases) — found that rounding up occurred in around 5.6% of cases (103 cases). Of these, 77% slightly overstated the true ratio (79 cases) and 23% slightly understated the true ratio (24 cases). Overall, however, only 6 cases were falsely rejected and only one case was falsely accepted. If a similar number of cases were affected in this way each year, then the frequency of findings of special circumstances in the study may be understated by approximately 0.3 percentage points.

129 See *Rios v R* [2012] NSWCCA 8 where the court made it clear that it is preferable to express sentences in years and months and not “descend into numbers of days”: at [42]–[43]. How often this occurred is unknown. However, these cases fall within the borderline cases: see below n 131.

130 The practise is to backdate the commencement date to include the period of pre-sentence custody, rather than reduce the non-parole period and full term of sentence by the amount of pre-sentence custody. However, if the latter occurred, the ratio would be lower than the ratio had the sentence been backdated. How often this occurred is unknown.

131 An analysis of cases in the study with a ratio between 70 and 75% (684 cases) where the remarks on sentence and/or Court of Criminal Appeal judgments were available (198 cases) found that the sentencing judge made no findings of special circumstances in 44 cases. In most of these cases, the ratio was above 73%. Extrapolating to the remaining cases, it is estimated that the frequency of findings of special circumstances in the study may be overstated by approximately 1.3 percentage points. In a small number of cases, a finding of special circumstances was necessary to adjust the ratio for an individual offence(s) because of the effect of accumulation on the structure of the overall sentence. While the intention was to reflect the statutory ratio at the overall level, a slight variation remained. It is estimated that the frequency of findings of special circumstances may be overstated by up to a further 0.5 percentage points.

132 A first instance or appeal judgment was available for 1,738 special circumstances cases. A random sample of 200 cases (11.5%) was examined. The random sample contained 76 first instance judgments (42 District Court and 34 Supreme Court). The only judgments in the remaining 124 cases were judgments handed down in the Court of Criminal Appeal. However, the reasons for a finding of special circumstances were not stated in 41 of the Court of Criminal Appeal judgments.

133 Since the median and mean ratios were similar, only the mean ratios are used in the study.

While the analysis of the data is primarily descriptive, non-parametric tests of significance are used to ascertain whether there were any statistically significant bivariate relationships between certain factors and the various measures:

- The chi-square test is used for nominal data such as gender, plea and the frequency of findings of special circumstances.
- The Kruskal-Wallis test is used for interval and ordinal data such as age, length of overall full term of sentence and the mean ratio.
- Due to the effect that large sample sizes have on the chi-square statistic, measures of association are also used to determine the relative strength (or magnitude) of each relationship.
- Cramer's V is used when assessing the strength of the relationship with the frequency of findings of special circumstances.
- Eta is used when assessing the strength of the relationship with the mean ratio.¹³⁴

Results of analysis

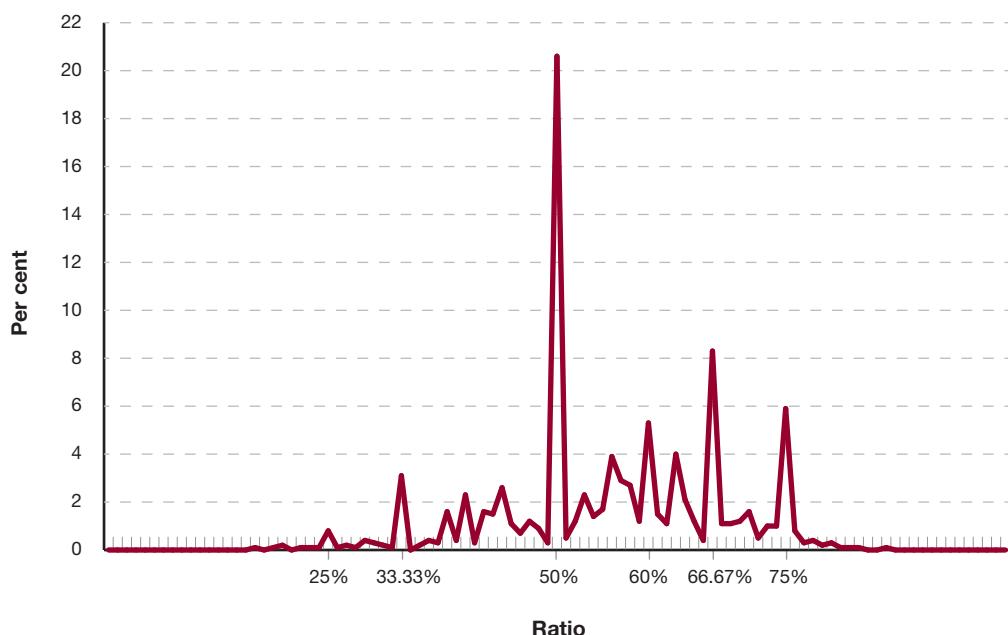
Frequency of findings of special circumstances

Figures 1 to 3 show the relationship between the non-parole period and the full term of the overall sentence for the 13,401 cases that fell within the parameters of the study:

- Figure 1 shows the ratios for cases in the reference period along a continuous scale.
- Figure 2 shows the ratios (grouped) for cases in the study by year.
- Figure 3 shows the frequency of findings of special circumstances and the mean ratio for "all cases" by year.

As all three figures show, special circumstances were found in the vast majority of cases (12,253 or 91.4%). As Figures 2 and 3 show, this high figure fluctuated slightly from year to year, ranging from 89.4% in 2005 and 2006 to 94.4% in 2011.¹³⁵

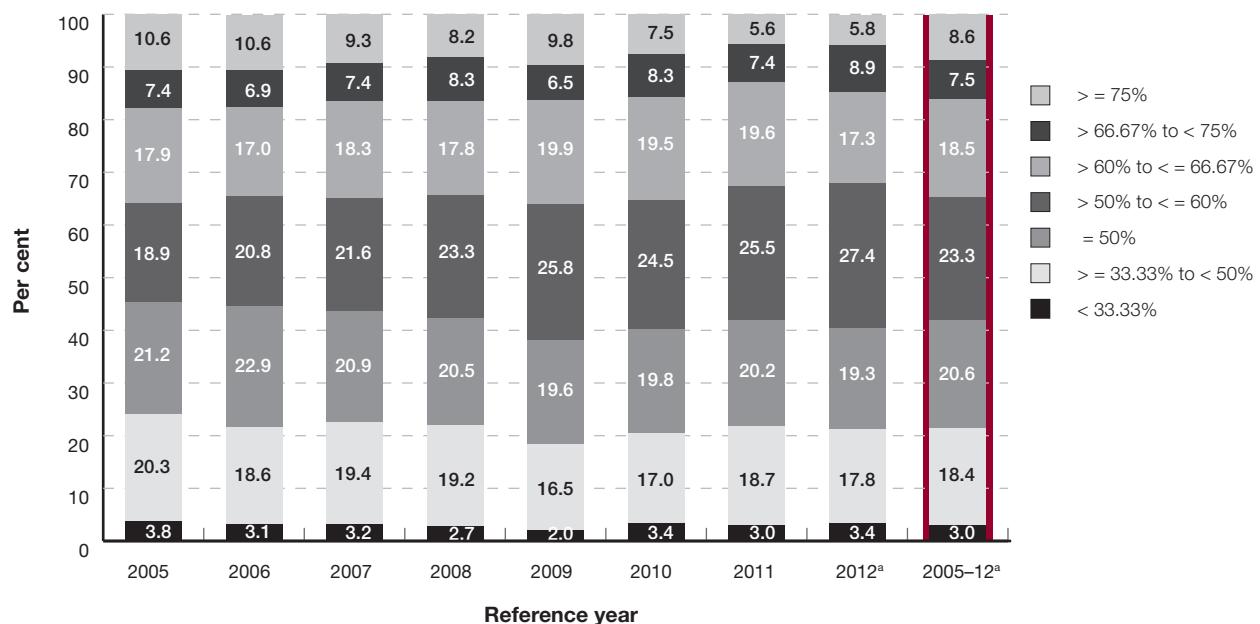
Figure 1: Relationship between the non-parole period and the full term of the overall sentence (ratio)



¹³⁴ The Kruskal-Wallis test returns the same value as the Mann-Whitney U test (for two independent samples) and Cramer's V returns the same value as Phi (for 2 x 2 tables). Cramer's V and Eta have a value between 0 (completely unpredictable) and 1 (perfectly predictable). The Eta² statistic represents the proportion of variation in the mean ratio that can be explained by each factor.

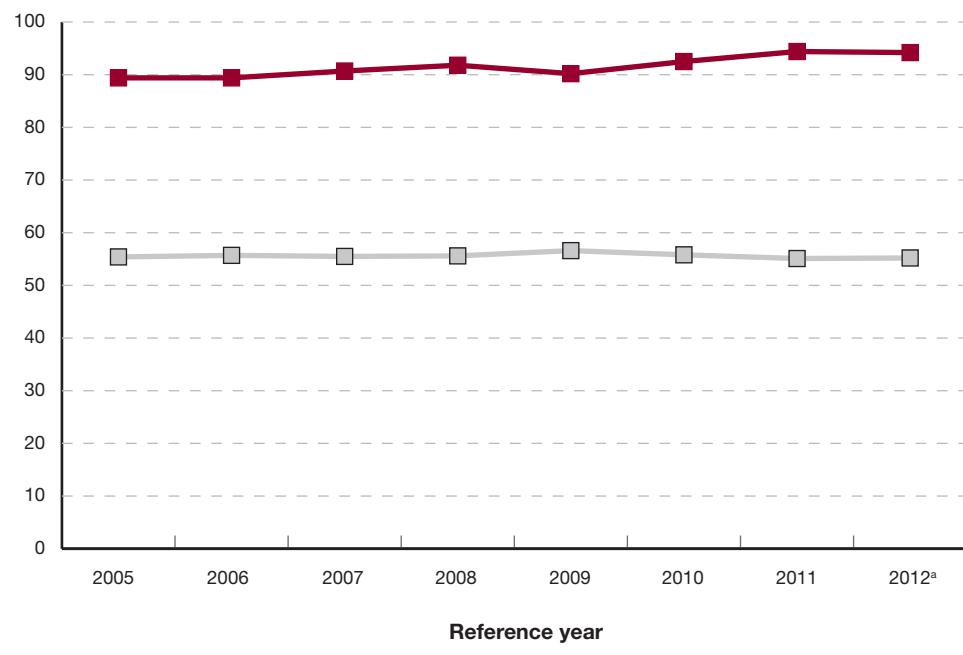
¹³⁵ See Table 2 for the figures by reference year. While this finding was found to be statistically significant, the strength of the association was weak: Cramer's V = 0.064; chi-square test, p < 0.000.

Figure 2: Relationship between the non-parole period and the full term of the overall sentence by reference year and ratio grouping



a The reference year 2012 comprises data for the first six months only.

Figure 3: Frequency of findings of special circumstances and the mean ratio between the non-parole period and full term of the overall sentence by reference year



a The reference year 2012 comprises data for the first six months only.

Degree of departure from the statutory ratio

Figure 1 also shows that the most common ratio (by far) between the non-parole period and the full term of the overall sentence was 50%, that is, the non-parole period was set at half of the full term of the overall sentence (20.6% of cases). Other common ratios were 66.67%, or two-thirds, (8.3% of cases), 75% (5.9% of cases) and 60% (5.3% of cases).

As Figure 2 shows, 21.5% of cases had a ratio less than 50%; 42.0% had a ratio of 50% or less; 65.3% had a ratio of 60% or less; and 83.9% had a ratio of 66.67% or less. The mean ratio for “all cases” was 55.65% and the median ratio was 55.56%. The mean and median ratios for “special circumstances cases” were 53.73% and 53.33% respectively.

Figures 2 and 3 show there was little variation in the ratios from year to year.¹³⁶

Reasons for finding special circumstances — random sample

At least since *R v Simpson*,¹³⁷ it has been accepted that a wide range of factors is capable in combination (and sometimes in isolation) of constituting special circumstances. The real issue faced by the court in a given case is whether it should find special circumstances and vary the statutory ratio.¹³⁸

According to the Court of Criminal Appeal, a finding of special circumstances must be “purposeful” and s 44(2) cannot be utilised just to relieve the offender from serving the non-parole period.¹³⁹

As mentioned earlier, a random sample of 159 judgments in which a finding of special circumstances was expressly made were examined to ascertain the reasons for departing from the statutory ratio (random sample cases).¹⁴⁰ Table 1 lists the reasons given for finding special circumstances in the random sample cases.

Table 1: Reasons given in random sample cases for varying the statutory ratio

Reason	N	% ^a
Need for lengthy period of supervision in community after release	106	66.7
■ need for rehabilitation	27	17.0
■ need for treatment	48	30.2
– drugs	25	15.7
– alcohol	14	8.8
– mental health	25	15.7
■ assistance and support with reintegration	16	10.1
Lack of criminal record	57	35.8
Good prospects of rehabilitation (capacity to reform)	47	29.6
Age of offender	41	25.8
Effect of accumulation	37	23.3
Hardship	16	10.1
Poor health	8	5.0
Extraordinary subjective features (nec)	8	5.0
Risk of institutionalisation	3	1.9
Other ^b	4	2.5

a Based on 159 cases. Percentages do not total 100% because multiple reasons were commonly given to justify the departure from the statutory ratio.

b Other includes two cases where the success of the Crown appeal necessitated a finding of special circumstances on the basis of double jeopardy (one case) and a return to custody (one case). In another case a finding was made in order to achieve parity of sentence. In the final case, the offender was sentenced according to past practices before the commencement of the Sentencing Act 1989.

¹³⁶ Although the difference in the mean ratio was found to be statistically significant: Kruskal-Wallis test, $p < 0.029$, the strength of the association was very weak: Eta = 0.006.

¹³⁷ (2001) 53 NSWLR 704.

¹³⁸ *R v Fidow* [2004] NSWCCA 172 at [22], quoted in *R v GWM* [2012] NSWCCA 240 at [106].

¹³⁹ *R v Kaiti* [2001] NSWCCA 268, cited with approval in *R v GWM* ibid at [104].

¹⁴⁰ See n 132 above.

It is worth first noting that usually more than one reason was given (78% of random sample cases): 37.7% (two reasons), 22.6% (three reasons), 11.9% (four reasons) and 5.7% (five or more reasons). Only 22% cited a single reason.

The most common reason given was the offender's need for a lengthy period of supervision in the community after release (66.7%), followed by the lack of prior criminal record (35.8%) — these mostly referred to the offender serving their first prison sentence. Other common reasons were good prospects of rehabilitation (29.6%), age of the offender (25.8%) (particularly their youth), the effect of accumulation (23.3%), and hardship of custody (10.1%). The reasons given should not be viewed in isolation. There is a clear interrelationship between the different reasons included in Table 1. For example, a need for a lengthy period of supervision encompasses the need for:

- an offender's rehabilitation
- assistance and support with reintegration into the community
- treatment for alcohol or drug dependency
- treatment to address mental health issues.

The offender's age and first time in custody were the reasons given in 25 cases. These offenders were mostly young people, but there was a small group of older offenders: three were in their sixties, one in his fifties and one in his late forties.

It should be noted that in *Collier v R*,¹⁴¹ McClellan CJ at CL had "considerable reservations"¹⁴² as to whether the fact that a person would be in custody for the first time or has no previous convictions were of themselves reasons capable of justifying a finding of special circumstances.¹⁴³ This is because they are matters that will already have been taken into account when the court set the full term of sentence and the non-parole period, and should not be a source of further leniency.¹⁴⁴ In the present study, this reason was the only one given to justify a finding of special circumstances in just 5 random sample cases (3.1%). In the other cases, it was combined with age, the need for supervision and the need for reintegration into the community.

The type, frequency and pattern of reasons given in Table 1 are broadly consistent with the findings of an analysis undertaken in an earlier Judicial Commission robbery study.¹⁴⁵

Factors associated with special circumstances

As stated above, there is a wide range of factors which are *capable* of constituting special circumstances. As remarks on sentence were not available in the majority of cases, the available data were examined to assess other possible factors and their relationship to findings of special circumstances.

Table 2 shows the bivariate relationship between each factor and:

- the frequency of findings of special circumstances
- the degree of departure from the statutory ratio for "all cases" and for "special circumstances cases".

While the bivariate relationship between the factors and findings of special circumstances is shown in Table 2, it should be acknowledged that it would be unusual for a single factor to warrant a finding of special circumstances. It should also be acknowledged that there are other factors for which no data were available such as an offender's need for rehabilitation or need for treatment for alcohol or drug dependency.

Two factors with ordinal data — length of overall full term and age of offender — are also displayed graphically in Figure 4 and Figure 5 respectively.

Relationship with the frequency of findings of special circumstances

With the exception of the factors Indigenous status and whether or not the offence was committed before the *Sentencing Act 1989*, there was a statistically significant relationship between the factors in Table 2 and the frequency of findings of special circumstances. However, the strength of the association was weak for most factors.

141 [2012] NSWCCA 213.

142 *ibid* at [36].

143 *ibid* at [35]–[36].

144 *ibid*. See also Gleeson CJ's comments in *R v Farroukh* (unrep, 29/3/96, NSWCCA).

145 See L Barnes and P Poletti, *Sentencing robbery offenders since the Henry guideline judgment*, Research Monograph No 30, Judicial Commission of NSW, 2007, Sydney, pp 106–108.

The factor with the strongest association was the length of the overall full term of sentence.¹⁴⁶ The jurisdiction of the court¹⁴⁷ and plea¹⁴⁸ had the next strongest association. It should be pointed out, however, that both of these factors had a significant and strong interrelationship with the length of the overall full term that may account for the differences.¹⁴⁹

Relationship with the degree of departure from the statutory ratio

When the analysis focused on the degree of departure from the statutory ratio, the same factors referred to above, with the exception of Form 1 matters, were found to have a statistically significant relationship with the mean ratio for “all cases”. Once again, the strength of the association was weak for most factors.

In order of the magnitude of the association, the following offenders departed from the statutory ratio to a greater extent (lower mean ratio) than their respective counterparts set out in Table 2:

- offenders sentenced to an overall full term shorter than 4 years¹⁵⁰
- offenders sentenced for one offence only or offenders given non-consecutive sentences for multiple offences¹⁵¹
- juveniles or young offenders aged 18–20 years or offenders aged over 65 years¹⁵²
- offenders sentenced in the District Court¹⁵³
- offenders who pleaded guilty¹⁵⁴
- offenders not previously imprisoned¹⁵⁵

- offenders sentenced in reference year 2011 or 2012¹⁵⁶
- offenders with no prior convictions¹⁵⁷
- female offenders.¹⁵⁸

Length of overall full term

In any functional system of criminal justice it is imperative that those who are imprisoned address underlying issues that bear upon the risk of recidivism both while in prison and on release. As stated earlier, the system of parole is designed to achieve that end. As a practical matter, an offender must have a sufficient period of supervision. Parole supervision for up to 3 years can be imposed, after which time the offender is expected to have reintegrated into the community. Section 44(2) sets a 25% parole period unless there are special circumstances. Consequently, the scope for supervision will depend on the length of the overall full term of sentence. There is less scope for supervision for shorter sentences compared with longer sentences. For example, a sentence of 2 years imprisonment without a finding of special circumstances will result in a maximum parole period of 6 months. On the other hand, a sentence of 12 years without a finding of special circumstances will result in a maximum of 3 years parole. Therefore one would expect that shorter sentences of imprisonment are more likely to attract findings of special circumstances than longer sentences, and further, shorter sentences will have a greater degree of departure from the statutory ratio (that is, lower mean ratios) than longer sentences.

146 Cramer's V = 0.335; chi-square test, p < 0.000.

147 Cramer's V = 0.204; chi-square test, p < 0.000.

148 Cramer's V = 0.163; chi-square test, p < 0.000.

149 Cramer's V = 0.569; chi-square test, p < 0.000 and Cramer's V = 0.300; chi-square test, p < 0.000, respectively. The imposition of consecutive sentences was another factor found to be associated with the length of the overall full term of sentence: Cramer's V = 0.243; chi-square test, p < 0.000.

150 Eta = 0.469; Kruskal-Wallis test, p < 0.000. Approximately 22% of the variation in the mean ratio could be explained by this factor: Eta² = 0.220.

151 Eta = 0.271; Kruskal-Wallis test, p < 0.000.

152 Eta = 0.196; Kruskal-Wallis test, p < 0.000.

153 Eta = 0.182; Kruskal-Wallis test, p < 0.000.

154 Eta = 0.163; Kruskal-Wallis test, p < 0.000.

155 Eta = 0.128; Kruskal-Wallis test, p < 0.000.

156 Eta = 0.037; Kruskal-Wallis test, p < 0.029.

157 Eta = 0.026; Kruskal-Wallis test, p < 0.005.

158 Eta = 0.024; Kruskal-Wallis test, p < 0.000.

Table 2: Relationship between certain factors and the frequency of findings of special circumstances and the mean ratio between the non-parole period and full term of the overall sentence

Factor ^a	All cases		Special circumstances cases		
	N	Mean ratio	n	%	Mean ratio
Gender**					
Female	901	52.43	846	93.9	50.90
Male	12,500	55.89	11,407	91.3	53.94
Indigenous status					
Indigenous	2,974	55.54	2,711	91.2	53.53
Non-Indigenous	9,984	55.74	9,130	91.4	53.83
Age at offence**					
Less than 18 yrs	407	50.54	402	98.8	50.21
18–20 yrs	2,121	51.31	2,054	96.8	50.50
21–25 yrs	2,803	55.21	2,626	93.7	53.80
26–30 yrs	2,276	56.80	2,035	89.4	54.47
31–35 yrs	1,909	57.06	1,711	89.6	54.86
36–40 yrs	1,490	57.66	1,322	88.7	55.31
41–45 yrs	1,017	57.62	893	87.8	55.06
46–50 yrs	645	57.94	554	85.9	54.93
51–55 yrs	350	57.98	309	88.3	55.52
56–60 yrs	203	55.68	182	89.7	53.36
61–65 yrs	94	58.02	82	87.2	55.36
66–70 yrs	49	52.97	48	98.0	52.51
More than 70 yrs	25	50.67	25	100.0	50.67
Jurisdiction**					
Supreme Court	473	67.39	291	61.5	62.11
District Court	12,928	55.22	11,962	92.5	53.52
Pre-Sentencing Act 1989 offence					
Offence committed before 25/9/89	161	54.99	151	93.8	53.42
Offence committed on or after 25/9/89	13,240	55.66	12,102	91.4	53.73
Reference year**					
2005	1,691	55.36	1,512	89.4	52.88
2006	1,684	55.73	1,506	89.4	53.31
2007	1,706	55.47	1,547	90.7	53.34
2008	1,835	55.63	1,685	91.8	53.77
2009	1,984	56.57	1,790	90.2	54.47
2010	1,862	55.84	1,723	92.5	54.23
2011	1,826	55.05	1,724	94.4	53.79
2012	813	55.23	766	94.2	53.93
Plea**					
Guilty	11,946	54.94	11,109	93.0	53.33
Not guilty	1,369	61.56	1,068	78.0	57.49

Factor ^a	All cases		Special circumstances cases		
	N	Mean ratio	n	%	Mean ratio
Form 1 matters*					
No form 1	8,681	55.60	7,839	90.3	53.38
Form 1	4,720	55.76	4,414	93.5	54.34
Prior criminal record**					
No priors	2,649	55.01	2,466	93.1	53.44
Priors	10,652	55.80	9,698	91.0	53.78
Previously imprisoned**					
Not previously imprisoned	7,118	54.17	6,705	94.2	52.80
Previously imprisoned	6,177	57.33	5,454	88.3	54.83
Number of offences and accumulation**					
One offence only	6,341	53.35	5,858	92.4	51.52
Multiple offences — non-consecutive	2,738	53.34	2,526	92.3	51.50
Multiple offences — consecutive	4,322	60.49	3,869	89.5	58.52
Overall sentence (full term)**					
< 2 yrs	1,416	50.58	1,320	93.2	48.67
>= 2 < 3 yrs	2,895	50.23	2,765	95.5	49.02
>= 3 < 4 yrs	3,085	52.75	2,935	95.1	51.56
>= 4 < 5 yrs	1,827	56.47	1,674	91.6	54.67
>= 5 < 6 yrs	1,218	59.07	1,119	91.9	57.52
>= 6 < 7 yrs	863	60.58	786	91.1	59.06
>= 7 < 8 yrs	517	61.71	488	94.4	60.76
>= 8 < 9 yrs	376	63.59	321	85.4	61.60
>= 9 < 10 yrs	291	65.09	256	88.0	63.50
>= 10 < 12 yrs	296	67.53	241	81.4	65.55
>= 12 < 14 yrs	186	68.28	136	73.1	65.55
>= 14 < 16 yrs	122	69.62	99	81.1	67.92
>= 16 < 18 yrs	64	71.73	27	42.2	66.10
>= 18 < 20 yrs	60	73.27	30	50.0	70.40
>= 20 < 22 yrs	57	73.13	20	35.1	69.01
>= 22 < 24 yrs	37	74.96	11	29.7	71.47
>= 24 < 26 yrs	40	73.15	14	35.0	68.55
>= 26 < 30 yrs	26	74.76	5	19.2	69.68
>= 30 yrs	25	75.99	6	24.0	68.77
All cases	13,401	55.65	12,253	91.4	53.73

* Factor was found to be significantly associated with the frequency of findings of special circumstances (chi-square test) at 0.05 level.

** Factor was found to be significantly associated with the frequency of findings of special circumstances (chi-square test) and mean ratio (Kruskal-Wallis test) at 0.05 level.

a Figures are based on cases with known values: the Indigenous status of offenders was unknown in 443 cases (3.3%); the age of offenders was unknown in 12 cases (0.1%); no plea was recorded for 86 offenders (0.6%) who were found not guilty of a more serious offence but guilty of the statutory alternative; the prior record was unknown in 100 cases (0.7%); and whether the offender had previously been imprisoned was unknown in 106 cases (0.8%).

The full term of overall sentences in the study ranged from 7 months to 43 years with a median term of 3 years and 6 months. In the absence of a finding of special circumstances, the maximum parole period for the median term would be 10.5 months. The distribution of the overall full terms in the study is shown below as well as the maximum parole period without a finding of special circumstances:

- 17.1% of overall full terms were 2 years or less (6 months)
- 61.6% of overall full terms were 4 years or less (12 months)
- 90.1% of overall full terms were 8 years or less (24 months)
- 94.1% of overall full terms were 10 years or less (30 months)
- 96.1% of overall full terms were 12 years or less (36 months).

Given the supervision period for shorter sentences, it is unsurprising that a finding of special circumstances was made in the vast majority of those cases. Conversely, the longer the sentence, the lower the frequency of findings of special circumstances, demonstrating that the utility of finding special circumstances diminished the longer the sentence because the period of supervision would have been considered sufficient.

As shown, the length of the overall full term had the strongest association with the frequency of findings of special circumstances and the degree of departure from the statutory ratio. Figure 4 shows there was a noticeable decline in the frequency of findings of special circumstances when the overall full term reached 8 years and a further dramatic decline when the overall full term reached 16 years. The vast majority of sentences of less than 8 years attracted a finding of special circumstances (93.8%) compared with sentences of 8 years but less than 16 years (82.8%) and sentences of 16 years or more (36.6%).

Figure 4 also shows that as the length of the overall full term increased so did the ratio between the non-parole period and the full term of sentence. As mentioned above, the lowest mean ratios were observed for offenders sentenced to an overall full term shorter than 4 years (50.58% for sentences less than 2 years, 50.23% for sentences of 2 years but less than 3 years and 52.75% for sentences of 3 years but less than 4 years).

Other factors

Three of the factors in Table 2 were also identified in Table 1 as reasons for finding special circumstances in the random sample cases: age of offender, whether the offender had been previously imprisoned and whether the offender was sentenced to consecutive sentences.

Age

As Figure 5 shows, special circumstances were found more frequently for the youngest offenders (98.8% for juveniles and 96.8% for offenders aged 18–20 years) and for the oldest offenders (100% for offenders aged over 70 years and 98.0% for offenders aged 66–70 years). These offenders also had the greatest departure from the statutory ratio, recording the lowest mean ratios (50.54%, 51.31%, 50.67% and 52.97% respectively). These offenders accounted for around one in five cases in the study. Juvenile offenders represented 3.0% of cases, offenders aged 18–20 years represented 15.8% of cases and offenders aged over 65 years represented 0.6% of cases.

Previously imprisoned

Just over half (53.5%) of the offenders in the study had not been imprisoned previously. Special circumstances were found more frequently for these offenders (94.2%) than for offenders who had been imprisoned previously (88.3%). They also recorded a lower mean ratio (54.17% compared with 57.33%).

Consecutive sentences

Almost one-third (32.3%) of cases in the study were consecutive cases. However, these cases were less likely to attract special circumstances (89.5%) compared with non-consecutive cases (92.3%). This finding was also reflected in the higher mean ratio (smaller degree of departure from the statutory ratio) observed for consecutive cases (60.49%) compared with non-consecutive cases (53.34%).

This finding is perhaps not surprising since the imposition of consecutive sentences was a factor found to be significantly associated with the length of the overall full term of sentence.¹⁵⁹

159 Cramer's V = 0.243; chi-square test, p < 0.000.

Figure 4: Frequency of findings of special circumstances and the mean ratio between the non-parole period and full term of the overall sentence by length of overall sentence

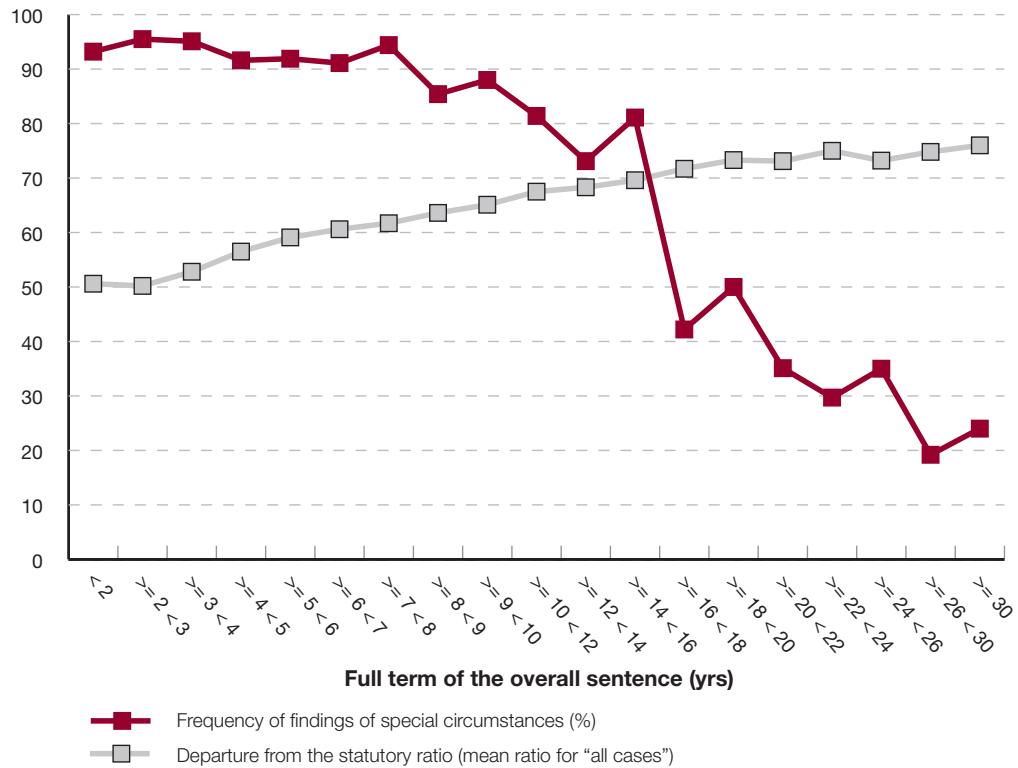
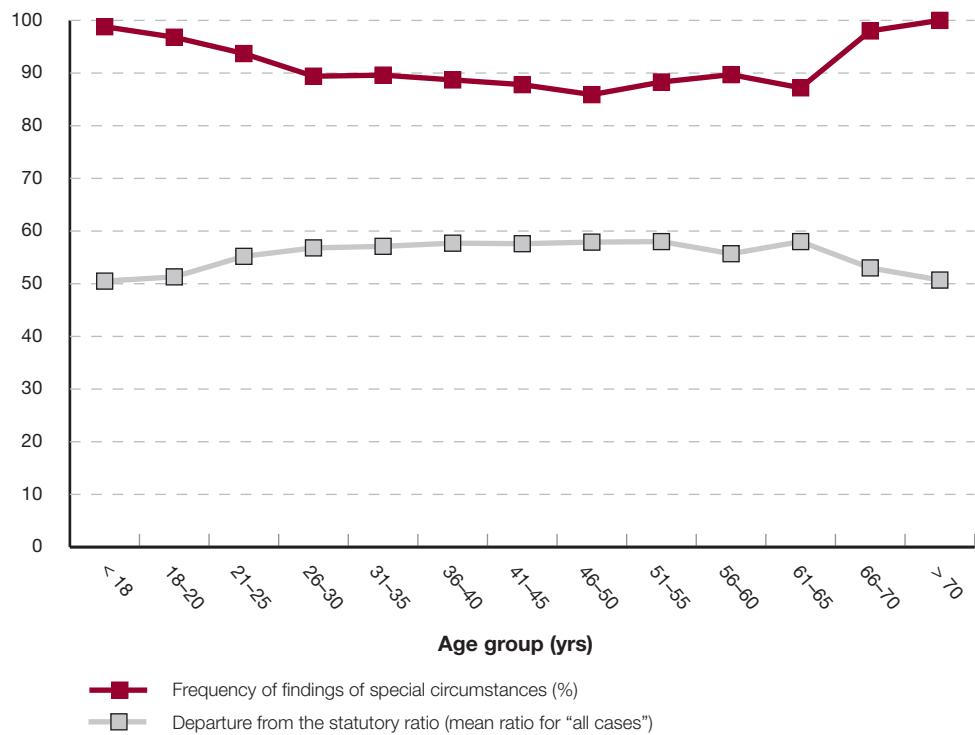


Figure 5: Frequency of findings of special circumstances and the mean ratio between the non-parole period and full term of the overall sentence by age of offender



Particular offences

The analysis so far has focused on the overall picture without taking account of individual offences. This section examines particular offences in relation to the frequency of findings of special circumstances and the degree of departure from the statutory ratio where special circumstances were found. In particular where there was a:

- low frequency of findings and a small departure (high mean ratio)
- low frequency of findings but a large departure (low mean ratio)
- high frequency of findings and a large departure (low mean ratio)
- high frequency of findings but a small departure (high mean ratio).

From the hundreds of offence categories dealt with in the higher courts, over half had fewer than 10 cases finalised in the reference period. The analysis below is limited to offences with more than 10 cases. Due to the high frequency of findings of special circumstances overall, the analysis focuses on offences where there was:

- a low frequency of findings of special circumstances
- the greatest departure from the statutory ratio.

Low frequency of findings of special circumstances

Murder

The offence of murder recorded the lowest frequency of findings of special circumstances (30.1%) and also had the smallest departure from the statutory ratio where special circumstances were found (mean ratio = 70.37%). When all murder sentences were included, the mean ratio was 74.23%. This is unsurprising given the long duration of murder sentences (median full term was 21 years 10 months) and limited utility of an extended period of supervision. It also explains why jurisdiction as a factor (all murder cases are prosecuted in the Supreme Court) had a strong association with findings of special circumstances.

An examination of murder cases where special circumstances were found revealed that these cases were more likely than cases without a finding of special circumstances to comprise:

- younger offenders (49.2% were 25 years or under compared with 29.0%), and in particular juvenile offenders (15.9% compared with 2.8%)
- offenders not previously imprisoned (74.6% compared with 58.2%)
- offenders who pleaded guilty (54.0% compared with 41.1%).

They were also more likely to incur overall full terms less than 16 years (17.5% compared with 3.4%).

An earlier Judicial Commission study of sentencing levels for murder from 1990–1993 found “sentences typically departed from the one-third formula”¹⁶⁰ and that the typical sentence comprised “a minimum term of 12 years and an additional term of 6 years”,¹⁶¹ that is, a ratio of 66.67%. Another Judicial Commission study of sentences in 1992 found special circumstances in just over 60% of murder cases.¹⁶² Further, it found that murder was one of the most common offences where a finding was made.¹⁶³

The present study shows that special circumstances were found less frequently and there was less departure from the statutory ratio for this offence. This is consistent with a Judicial Commission study of sentences in 2002 which found that the ratio between the non-parole period and the full term of the sentence was “75% or more in 77.1% of cases, including 6 life sentences”.¹⁶⁴ When the six life sentences are excluded, special circumstances were found in only 27.6% of cases.¹⁶⁵

Other offences

A number of other offences also had a relatively low frequency of findings of special circumstances and relatively small departures from the statutory ratio where special circumstances were found. These offences were (in order of degree of departure for “all cases”):

- certain other attempts to murder (*Crimes Act 1900*, s 29): 57.1% and 67.21% respectively (mean ratio for “all cases” = 70.96%)

¹⁶⁰ D Spears and I MacKinnell, “Sentencing homicide: the effect of legislative changes on the penalty for murder”, *Sentencing Trends & Issues*, No 7, Judicial Commission of NSW, 1994, Sydney, p 3.

¹⁶¹ ibid. See also *R v McDonald* (unrep, 18/8/94, NSWCCA) where it was said that a tariff was developing for murder offences: a benchmark sentence was 20 years comprising a minimum term of 14 years and an additional term of 6 years. The ratio for this benchmark sentence is 70% which means that an ordinary case attracts a finding of special circumstances.

¹⁶² MacKinnell, Spears and Takachi, above n 2, p 5.

¹⁶³ ibid.

¹⁶⁴ Keane, Poletti and Donnelly, above n 2, p 11.

¹⁶⁵ ibid. This study excluded consecutive cases. However, as there were only 3 such cases, the findings were consistent with those in the current study.

- acts done to the person with intent to murder (*Crimes Act 1900*, s 27) – 64.0% and 64.73% respectively (mean ratio for “all cases” = 68.70%)
- attempts to choke, etc (garrotting) (*Crimes Act 1900*, s 37): 54.5% and 62.20% respectively (mean ratio for “all cases” = 68.27%).

Escape lawful custody

The distinctive feature of sentencing for the escape offence is that the court is obliged to impose a sentence which is consecutive on any existing non-parole period(s).¹⁶⁶ This constraint on the sentencing discretion may require the court to adjust the non-parole period for the escape offence downwards in order to properly apply the principle of totality.¹⁶⁷ While the offence of inmate escape or attempt to escape lawful custody (*Crimes Act 1900*, s 310D(a)) recorded a relatively low frequency of findings of special circumstances (69.2%), it had one of the greatest departures from the statutory ratio where special circumstances were found (mean ratio = 46.01%). When all escape sentences were included the mean ratio was 55.53%.

Greatest departure from the statutory ratio

A more useful measure than the frequency of findings of special circumstances is the degree of departure from the statutory ratio for “all cases”. For example, there were 15 offences where special circumstances were found in every case. However, the degree of departure from the statutory ratio for those offences varied from 47.44% to 59.17%. Furthermore, there were a number of offences where the frequency of findings of special circumstances was not quite as high as 100%, although the degree of departure was much greater than for some of those offences that attracted special circumstances in every case.

The following five offences had the greatest departure from the statutory ratio. The frequency of findings of special circumstances and the degree of departure from the statutory ratio where special circumstances were found are set out below (in order of degree of departure for “all cases”):

- indecent assault on female (*Crimes Act 1900*, s 76 (rep)): 100% and 47.44% respectively (mean ratio for “all cases” = 47.44%)
- demanding property with intent to steal (*Crimes Act 1900*, s 99(1)): 96.4% and 47.44% respectively (mean ratio for “all cases” = 48.43%)

- indecent assault on male (*Crimes Act 1900*, s 81(rep)): 100% and 48.58% respectively (mean ratio for “all cases” = 48.58%)
- aggravated breaking out of dwelling-house after committing, or entering with intent to commit, indictable offence (*Crimes Act 1900*, s 109(2)): 100% and 49.34% respectively (mean ratio for “all cases” = 49.34%)
- stealing property in a dwelling-house (*Crimes Act 1900*, s 148): 81.8% and 44.69% respectively (mean ratio for “all cases” = 50.20%).

It was not possible to ascertain directly why these five offences departed the most from the statutory ratio. However, the departure may be explained, in part, by factors such as an offender’s need for a longer period of supervision than the statutory ratio would allow and/or the age of the offender. With the exception of the offence of aggravated breaking out of dwelling-house after committing, or entering with intent to commit, indictable offence (which also has the highest maximum penalty), the offences received, on average, sentences less than the overall median full term of 3 years and 6 months — the lowest was 22.5 months for stealing property in a dwelling-house. Two offences (aggravated breaking out of dwelling-house after committing, or entering with intent to commit, indictable offence and demanding property with intent to steal) were disproportionately committed by young offenders aged 25 years or under (71.4% and 44.4% respectively). As for the two repealed indecent assault offences (one repealed in 1981 and the other in 1984), not only were these offenders much older when they came to be sentenced (median age was 69 years and 68 years respectively), but only one offender had previously been imprisoned. Further, the fact that they were required to be sentenced according to past practices (see below) may also have justified a finding of special circumstances.¹⁶⁸

Pre-Sentencing Act 1989 offences

Where an offender committed an offence before the *Sentencing Act 1989* commenced, the court is required to set the non-parole period according to past practices. It has been held that the statutory sentencing regime applicable to the old offending may itself justify a finding of special circumstances, quite apart from other subjective features which may have done so.¹⁶⁹

¹⁶⁶ *Crimes (Sentencing Procedure) Act*, ss 57(2), (3).

¹⁶⁷ For example, see the discussion of totality and escape in the Crown appeal, *R v Hookey* [2009] NSWCCA 252 at [31], and the severity appeal, *Jinnette v R* [2012] NSWCCA 217 at [116].

¹⁶⁸ *AJB v R* (2007) 169 A Crim R 32 at [36]–[37]; *MJL v R* [2007] NSWCCA 261 at [42]. *Magnuson v R* [2013] NSWCCA 50 at [82].

¹⁶⁹ *ibid*.

In the present study, there were 161 such cases and special circumstances were found in 151 of these (93.8%) and the degree of departure from the statutory ratio for “all cases” was 54.99%. In these cases, the fact that an offender was sentenced according to past practices may have been one of several reasons why special circumstances were found which justified a variation from the statutory ratio.

Offence seriousness and special circumstances

The final analysis tests the proposition that shorter sentences of imprisonment are more likely to attract findings of special circumstances than longer sentences, and further, that shorter sentences will have a greater degree of departure from the statutory ratio (that is, lower mean ratios) than longer sentences.

The 10 most common offences in the study were identified. Eight were a basic or an aggravated (or a more serious) form of the same offence. These have been selected for analysis and are grouped as follows:

- robbery
- robbery being armed or in company
- break, enter and commit a serious indictable offence
- supply prohibited drug.

A further offence group, sexual assault, was selected on the basis that an aggravated form of the offence was in the top 10.

While there may have been forms of offences within these offence groups which did not fall within the top 10 offences, they were included in the analysis in order to demonstrate the effect of offence seriousness on the frequency of findings of special circumstances and the degree of departure from the statutory ratio.

Each offence group represents a discrete statutory scheme with graduating levels of seriousness both because of the maximum penalty and the circumstances of aggravation or seriousness. Two of the five offence groups had two levels of offence seriousness and three offence groups had three levels. Together, these 13 offences accounted for just over half of the cases in the study (50.2%).

Table 3 sets out the particular offences within each group. For each offence it shows the statutory maximum penalty, the median full term of the

overall sentence, the frequency of findings of special circumstances and the degree of departure from the statutory ratio (for “all cases” and for “special circumstances cases”). It is clear from Table 3 that within each offence group, the more serious the offence the longer the sentence. If the proposition stated above holds, one would expect:

- fewer findings of special circumstances as the seriousness of the offence increases, and
- a smaller degree of departure from the statutory ratio the more serious the offence.

Table 3 largely confirms the above proposition. It shows that for every offence group, except break, enter and commit a serious indictable offence, the mean ratio for “all cases” increased as the seriousness of the offence increased. With the exception of break, enter and commit a serious indictable offence and supply prohibited drug, the frequency of findings of special circumstances also decreased as the seriousness of the offence increased. In the case of supply prohibited drug, while the frequency of findings was higher for offences involving a commercial quantity of drugs than for offences involving less than a commercial quantity, the degree of departure from the statutory ratio was considerably less.

The break and enter exception

Table 3 shows different results for the offence group of break, enter and commit a serious indictable offence. The specially aggravated form of the offence under s 112(3) had the highest frequency of special circumstances (96.9%) but the smallest departure from the statutory ratio (58.00%). The aggravated form of the offence under s 112(2) had a slightly higher frequency of findings of special circumstances (93.6%) and a slightly greater departure from the statutory ratio (53.60%) than offences committed under s 112(1) (92.1% and 55.04% respectively). Further analysis of the data revealed that there were factors which might explain these differences.

At least three factors were at play:

- the jurisdictions in which the offences can be dealt with
- age of the offenders
- previous offending.

It is axiomatic that these factors interrelate.

Table 3: Offences within selected offence groups and their relationship to findings of special circumstances and the mean ratio between the non-parole period and full term of the overall sentence

Offence ^a	Level of seriousness	Maximum penalty	Overall sentence (full term)	All cases		Special circumstances cases		
				Median	N	Mean ratio	n	%
Robbery								
CRI s 94	basic offence	14 yrs	2 yrs 6 mths	342	50.81	329	96.2	49.81
CRI s 95(1)	aggravated offence	20 yrs	3 yrs 6 mths	300	53.23	284	94.7	51.97
Robbery being armed or in company								
CRI s 97(1)	basic offence	20 yrs	3 yrs 9 mths	1,753	52.89	1,681	95.9	51.90
CRI s 97(2)	aggravated offence (dangerous weapon)	25 yrs	6 yrs	290	59.23	266	91.7	57.64
Break, enter and commit serious indictable offence								
CRI s 112(1)	basic offence	14 yrs	3 yrs	583	55.04	537	92.1	53.21
CRI s 112(2)	aggravated offence	20 yrs	3 yrs 6 mths	1,102	53.60	1,031	93.6	52.03
CRI s 112(3)	specially aggravated offence	25 yrs	6 yrs	97	58.01	94	96.9	57.43
Sexual assault								
CRI s 61I	basic offence	14 yrs	5 yrs	238	58.76	208	87.4	56.24
CRI s 61J(1)	aggravated offence	20 yrs	8 yrs	298	62.93	251	84.2	60.39
CRI s 61JA(1)	aggravated offence in company	life	14 yrs 1.5 mths	22	66.34	17	77.3	62.82
Supply prohibited drug								
DRU s 25(1)	less than commercial quantity	15 yrs	2 yrs 6 mths	1,069	53.04	998	93.4	51.41
DRU s 25(2)	commercial quantity	20 yrs	5 yrs 10 mths	407	57.19	395	97.1	56.60
DRU s 25(2)	large commercial quantity	life	9 yrs	224	63.31	191	85.3	61.23
All cases			3 yrs 6 mths	13,401	55.65	12,253	91.4	53.73

a CRI refers to the *Crimes Act 1900*; DRU refers to the *Drug Misuse and Trafficking Act 1988*.

Section 112(3) is a strictly indictable offence and also a “serious children’s indictable offence”.¹⁷⁰ These offences are dealt with on indictment in the higher courts. Unlike s 112(3), an offence under s 112(2) is strictly indictable for adult offenders, but children may be dealt with in the Children’s Court.¹⁷¹ Section 112(1) offences can be dealt with summarily in the Local Court¹⁷² or the Children’s Court.

Consequently, there was a higher number of young offenders in the study aged under 21 years (41.2%, including 20.6% who were juvenile offenders) who committed s 112(3) offences. However, the degree of departure from the statutory ratio for s 112(3) offences was not as great as the other

offences within the offence group. This may reflect the necessity for the non-parole period to represent the seriousness of the offence. In the case of offences under s 112(1) and s 112(2), the counterintuitive results may be explained by differences in offender characteristics. First, as s 112(1) can be dealt with summarily, it would be expected that the cases dealt with in the higher courts fell into the more serious category. Further, the vast majority of offenders who committed an offence under s 112(1) had previously been imprisoned (86.7%, including 79.0% for an offence of the same type). Further, only 7.9% were aged less than 21 years. In comparison, offenders who committed an offence under s 112(2) were less

170 *Children (Criminal Proceedings) Act 1987*, s 3.

171 *ibid* s 28(1)(a).

172 *Criminal Procedure Act 1986*, Sch 1, Table 1, Pt 2, item 8.

likely to have been previously imprisoned (69.4%, including 58.1% for an offence of the same type), and were more likely to be aged less than 21 years (28.5%). These factors — age and reduced prospects of rehabilitation — have a direct bearing on the issue of special circumstances as the discussion above illustrates.

Conclusion

The concept of special circumstances in s 44(2) remains an integral part of the sentencing process for State offences. The provision should neither be applied as a statutory norm nor necessarily be taken into account as the last consideration in the sentencing exercise. It is an essential tool used to address the offender's rehabilitation. Since the statutory ratio is set at 75%, NSW has one of the harshest sentencing statutes in Australia.

During the reference period, special circumstances were found in 91.4% of 13,401 cases where a non-parole period was set for the overall sentence. However, this figure of itself does not address or inform the degree to which sentences imposed by courts depart from the statutory ratio in s 44(2). When the degree of departure from the statutory ratio was analysed, the most common ratio between the non-parole period and the full term of the overall sentence was 50%. This was found in 20.6% of cases. The non-parole period was set at less than 50% in 21.5% of cases and set at between 50% and 75% in 49.4% of cases. In almost a quarter of cases (23.9%), the non-parole period was set at 60% to 66.67%. The average, or mean, ratio was 55.65%. These findings were broadly comparable with sentences imposed in Victoria.

A finding of special circumstances cannot be made simply to relieve an offender of a longer non-parole period. It must ordinarily serve a purpose related to the offender's need for an extended period of supervision. A discrete analysis of a random sample of 159 judgments where a finding of special circumstances was made revealed that usually more than one reason was provided by the court and the factors cited were often interrelated. These included the offender's:

- need for a lengthy period of supervision to enable professional support and assistance
- lack of criminal history (serving a first prison sentence)
- good prospects of rehabilitation
- age (particularly their youth).

The effect of accumulation of sentences was also cited as a factor. Sentencing judges appear to be largely following the Court of Criminal Appeal position that an offender's first time in custody is not, of itself, a sufficient reason to make a finding of special circumstances. In only 5 cases (3.1%) was this the only reason cited.

The data was examined to gauge the effect of other possible factors and their relationship to findings of special circumstances. The length of the overall full term had by far the strongest association with the frequency of findings of special circumstances and the degree of departure from the statutory ratio. As the length of the overall full term increased so did the ratio between the non-parole period and the full term of sentence. The lowest mean ratios were observed for offenders sentenced to an overall full term shorter than 4 years (50.58% for sentences less than 2 years, 50.23% for sentences of 2 years but less than 3 years and 52.75% for sentences of 3 years but less than 4 years).

It is clear that the need for the court to utilise s 44(2) reduces the longer the duration of a sentence. For example, the most serious offence in the criminal calendar, murder, had the lowest frequency of findings of special circumstances (30.1%) and the highest mean ratio (74.23%) of any offence in the study. This also held true where we controlled for the offence using specific offence groupings with graduating levels of seriousness: the more serious the offence, the longer the sentences. There were fewer findings of special circumstances and smaller degrees of departure from the statutory ratio the more serious the offence (subject to some explicable exceptions). This was evidence of a diminution in the weight attributed to factors capable of finding special circumstances. It also indicated that the period of supervision was adequate without a finding being made under s 44(2).

The study therefore confirms that a wide range of factors, often considered in combination, are capable of justifying a finding of special circumstances. The weight attributed to these factors diminishes the more serious the offence and the longer the sentence. In every case there is the prevailing consideration that the court must impose a non-parole period which represents the minimum period that justice requires the offender spend in full-time custody.

Appendix A: The calculation of special circumstances

The following sets out the rationale for the method used to measure both the frequency of findings of special circumstances and the degree of departure from the statutory ratio in s 44(2). The measurement was straightforward where the offender was sentenced for only one offence (6,341 or 47.3% of cases analysed). The difficulty arises where an offender is sentenced for more than one offence.

The issue is whether special circumstances should be calculated at the individual level, that is, by using the ratio for the principal offence only, or alternatively, whether it should be calculated at the overall level, that is, the ratio between the non-parole period and full term of the overall sentence. Where the offender is sentenced to wholly concurrent sentences, or where secondary offences are subsumed within the sentence for the principal offence (2,738 or 20.4% of cases analysed), it does not matter because the ratio at the principal offence level and the overall level is the same. However, the ratio will be different in most cases where consecutive sentences are imposed, or where an aggregate sentence is imposed under the recently enacted s 53A of the *Crimes (Sentencing Procedure) Act* (4,322 or 32.3% of cases analysed).

Table A shows the relationship between the ratio at the principal offence level (principal offence ratio) and the ratio at the overall level (overall ratio) and findings of special circumstances for the 4,322 cases where multiple sentences were imposed and where some form of accumulation occurred. It divides the cases into four possible sentencing scenarios:

- where the principal offence ratio is equal to the overall ratio
- where the principal offence ratio is less than the overall ratio
- where the principal offence ratio is more than the overall ratio
- where a s 53A aggregate sentence was imposed and a non-parole period was not indicated for the principal offence.

It also shows how often special circumstances were found at the principal offence level and at the overall level.

Table A shows overwhelmingly that the principal offence ratio was less than the overall ratio (3,911 of 4,322 cases). In only 79 cases was the principal offence ratio the same as the overall ratio and in only 247 cases was the principal offence ratio more

than the overall ratio. Table A also shows that in 263 cases special circumstances were found for the principal offence but not at the overall level. Conversely, in 103 cases the ratio was less than 75% of the overall sentence but 75% or higher for the principal offence.

These figures clearly reveal that the degree of departure from the statutory ratio was greater at the principal offence level than at the overall level. It confirms the accepted sentencing practice of reducing the non-parole period for the principal offence where some form of accumulation is necessary in order to apply the principle of totality (discussed in the study).

If the study were to only use the ratio for the principal offence rather than the ratio for the overall sentence there is a real danger of presenting a distorted picture of special circumstances — particularly with regard to the degree of departure from the statutory ratio. The reality is that where an individual sentence is part of a larger exercise, the ratio of the non-parole period to the full term of sentence for the individual sentence cannot convey an accurate picture of what occurred in the sentencing exercise. The ratio set by the court for the overall sentence provides a much more accurate picture as it takes account of the structure of the whole sentence and the principle of totality. It may explain why a court has refrained from finding special circumstances on the basis that there was a sufficient period of supervision inherent in the sentence.

Another good reason for using the ratio for the overall sentence is that it was not possible in some cases to derive a ratio for the principal offence where an aggregate sentence under s 53A was imposed. Under s 53A a court is not required to indicate a non-parole period for offences that do not carry standard non-parole periods. Table A shows that a non-parole period was not indicated for the principal offence in 85 of 113 cases where an aggregate sentence was imposed. Put alternatively, a non-parole period was only indicated in 28 of 113 cases.

Since the analysis adopts the overall level, the 263 cases where a finding of special circumstances was made for the principal offence but not reflected in the overall sentence are excluded from the analysis. Conversely, the study includes the 181 cases where special circumstances were found for the overall sentence only, including 78 aggregate sentencing cases where there was no indicative non-parole for the principal offence.

Table A: Relationship between the ratio at the principal offence level and the overall level and findings of special circumstances for consecutive cases

Relationship between the ratio at the principal offence level and overall level ^a	Number of cases	Special circumstances found									
		Both principal offence and overall levels		Principal offence level only		Overall level only		Neither principal offence or overall levels		Total overall level	
		n	%	n	%	n	%	n	%	n	%
principal offence ratio = overall ratio	79	55	69.6	n/a		n/a		24	30.4	55	69.6
principal offence ratio < overall ratio	3,911	3,505	89.6	263	6.7	n/a		143	3.7	3,505	89.6
principal offence ratio > overall ratio	247	128	51.8	n/a		103	41.7	16	6.5	231	93.5
	4,237	3,688	87.0	263	6.2	103	2.4	183	4.3	3,791	89.5
s 53A aggregate sentence (no indicative non-parole period for principal offence)	85	n/a		n/a		78	91.8	n/a		78	91.8
	4,322	3,688	85.3	263	6.1	181	4.2	183	4.2	3,869	89.5

a Referred to as the principal offence ratio and overall ratio respectively.

Appendix B: Ratio between the non-parole period and term of sentence: NSW and Victoria comparison

Although there is no rule in Victoria which corresponds to the statutory rule in NSW, it is worthwhile making a jurisdictional comparison of the ratios between the non-parole periods and terms of sentence for cases dealt with on indictment (presentment).

The Victorian Sentencing Advisory Council provided sentencing data for a 5-year period 2007–08 to 2011–12. The data, like this study, exclude fixed term sentences and the ratios have been calculated at the overall (or effective) level. However, unlike this study, the data include sentences for

Commonwealth offences. Note also that the statistics on JIRS are adjusted or altered to take into account the outcomes of successful conviction or sentence appeals.

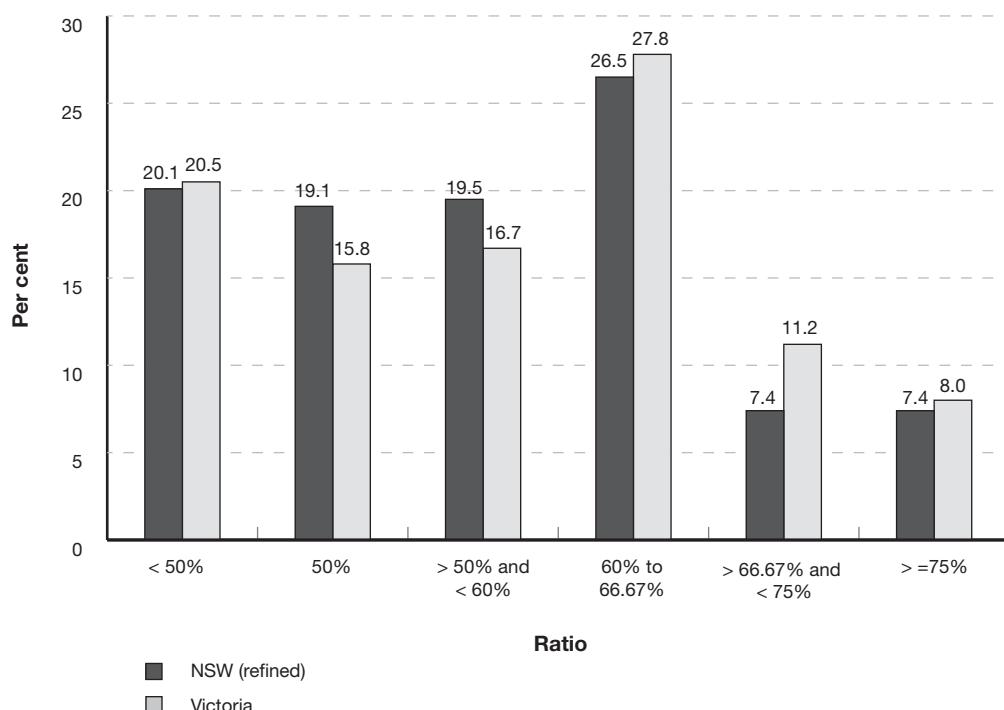
In order to make a more meaningful comparison with Victoria, the NSW data have been refined to include Commonwealth offences and to cover the same reference period from 1 July 2007 to 30 June 2012. During this period, NSW dealt with 9,943 cases compared with 4,635 cases in Victoria. Figure B shows the ratios (grouped) for both jurisdictions.

While a similar pattern was observed for the ratio groupings in each jurisdiction, Figure B shows that:

- higher courts in NSW set a non-parole period at 50% and less than 60% more often than Victoria (38.5% compared with 32.5%)
- higher courts in Victoria set a non-parole period between 66.67% and 75% more often than NSW (11.2% compared with 7.4%).

Overall, the non-parole period was set at less than 75% in both jurisdictions in the vast majority of cases (92.6% in NSW and 92.0% in Victoria). The average, or mean, ratio was 55.87% and 57.16% respectively.

Figure B: Relationship between the non-parole period and the full term of the overall sentence by jurisdiction and ratio grouping (1 July 2007 to 30 June 2012)



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